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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958.

## No. 646

**THE WANDERER**

FIREMAN'S FUND INSURANCE COMPANY,
*Petitioner-Appellant Below,*

*versus*

WILBURN BOAT COMPANY, ET AL.,
*Respondents-Appellees Below.*

## REPLY BRIEF.

EDWARD B. HAYES
135 South LaSalle Street
Chicago, Illinois

JOE A. KEITH
M. & P. National Bank Building
Sherman, Texas
Attorneys for Petitioner-Appellant

The Scheffer Press, Inc.—ANdover 3-6850

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As mere reading of the Response will have suggested, it offers the too-easy opportunity of demonstrating that it travels on misstatements and irrelevance.

The main point, however, is that respondents offer that too-easy opportunity in the hope of inducing forgetfulness of the real issue of general importance that is submitted by the Petition — whether a party in a Federal Court dare rely on a deliberate stipulation of the factual basis upon which the case is to be decided.

Instead of facing the real issue presented, respondents go outside the stipulated record in a grossly improper attempt to influence this Court with various materials

(none of which are either evidence or judicial admission) for two irrelevant and diversionary purposes:

First, to discredit the following determinations of the Court of Appeals:

> "That stipulated record did not contain evidence on which the court could base a finding of doing business in Texas." (Petition, Appendix p. 3a)
>
> "Nor was it, as the District Court stated, a matter on which the District Court, in this posture, could take judicial notice.
>
> "Since the District Court's whole opinion rested on the foundation that this was a Texas contract, it is clear that the resulting judgment cannot stand in view of the absence of legally-admitted evidence on the crucial point of doing business in Texas." (Petition, Appendix p. 4a)

The petition does not attack those holdings on which the Court of Appeals explicitly based its decision below that the judgment should be reversed and remanded for a new trial. The respondents chose not to attack them; they filed no petition for *certiorari* to have this Court redetermine those matters. Those matters are not here. Having failed to bring those issues here, the whole response consists of nothing but an attempt by respondents to discredit — not support or supplement — those holdings, by oblique discussion and innuendo (almost wholly injected by supposed material outside the record.) But for those holdings, the particular judgment below could not have been entered. Respondents' oblique attempt to discredit those holdings is obviously an attempt to attack the judgment below. This they may not do; this Court holds they have no standing to do so. *LeTulle* v. *Scofield*, 308 U.S. 415, 421 (1940); *Kellogg* v. *National Biscuit Co.*, 305 U.S. 111 (1938); *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1937); *Langnes* v. *Green*, 282 U.S. 531, 536-539 (1931).

Second, respondents' purpose is to induce forgetfulness of the fact that *if there had been* any basis in the record as made by plaintiffs-respondents for any finding that petitioner was doing business in Texas at the time of the contract (as the Court of Appeals held there was not) petitioner would not have rested on plaintiff's inadequate proof, but would have gone forward with its own proof, not only on that question, but — since there might then have been at least some basis for a finding that Texas law governed — with its evidence of defenses undebatably good under Texas law. The Court of Appeals expressly so recognized. (Petition, Appendix p. 5a)

The real issue which respondents never face — on which they hope to prevail, not by meeting it, but by inducing the Court *to forget it* — is whether a party in a Federal Court dares to rely on a deliberate, unchallenged and valid stipulation of the factual basis on which a case shall be decided; or must he expect that the stipulation will be disregarded, and that he will be put to proof at a remote time of matters theretofore irrelevant upon his opponent's proof, and, after the lapse of many years, when his evidence will have suffered the deterioration that, as the law recognizes in every context, necessarily infects all human evidence with the lapse of time.[1]

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[1] The "response" makes this crass effort to dodge the real issue abundantly clear; e. g., that petitioner was doing business in Texas when the suit was removed (Response, 2, 3) affords no basis for a finding that it was doing business in Texas at the earlier time when this policy attached; the District Court recognized that and the Court of Appeals so held. (Vide supra) A party who has deliberately stipulated that the cause shall be tried on the judicial admissions and evidence admitted in the record, is asking this Court to subvert the judicial process and compound the District Court's offense—an offense condemned by the Court of Appeals in a holding respondents did not ask this Court to reconsider—by repeated and extensive reference to obviously inadmissible hearsay.

The response compounds this attempt at diversion by downright misrepresentation.[2]

Respondents' treatment of authority is in keeping with their treatment of the facts.

They present an isolated sentence from the opinion of Mr. Justice Frankfurter in *U. S.* v. *John Felin & Co.*, 334 U. S. 624, 640 (1948) as follows:

> "Even where the parties • • • have stipulated as to the 'facts', this Court will disregard the stipulation, accepted and applied by the courts below, if the stipulation obviously forecloses real questions of law."

Anyone who reads the context of that sentence will discover why Mr. Justice Frankfurter put the word

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[2] One example, of many, is the innuendo that petitioner did not raise the issue that this contract was governed by Illinois law and not by Texas law. On page 3 of the response it is noted that respondents attached a copy of this certificate of authority to do business, to their brief in this Court before the re-trial; and proceeds to state that petitioner "did not choose to deny the validity of the certificate or to amend its pleadings in order to raise the defensive issue that they were not doing business in Texas." In petitioner's brief in this Court we specifically pointed out that the certificate was not in the record, called attention to the fact that, as there stated, on that record petitioner was "not shown ever to have done any business in Texas or even to have solicited any there." (Our Brief filed October 4, 1954, in this Court in No. 7, October Term, 1954, page 10 and Note 4.) That being thus pointed out to them, respondents nevertheless chose to stipulate that there should be no further evidence. It is interesting that respondents elected not to invite the petitioner's counter-proof even on this point, though they well knew that the statute they invoke depended on evidence which they knew was not in the record. They well knew petitioner's position that the cause was governed by Illinois law as against Texas law from the pleadings (R. 93), the argument at the first trial (285, 286), the argument before the Court of Appeals on the first appeal (Wilburn Boat Co. v. Fireman's Fund Insurance Co., 201 F. 2d 833, 837), and the argument in this Court.

"facts" in quotation marks. It was part of a discussion showing that this Court is not bound by so-called findings of "fact" which are really not such, but findings of mixed propositions of *law* and fact.

The Court of Claims had held that replacement cost was the proper measure of compensation. It had entered certain findings on that theory. (*Ibid,* 631-632) Mr. Justice Frankfurter's opinion noted that these findings were "inescapably enmeshed in considerations that are familiar issues of law and particularly of constitutional law," and referred to the well-recognized rule that where a conclusion is a "composite of fact and law," the Court might hold the findings erroneous as a matter of law. The parties in that case *had* proved certain *other* facts — requiring in Mr. Justice Frankfurter's view *the legal conclusion* that a certain measure of damages was controlling. They could not then change that *legal conclusion,* arising from those *other* facts *proved,* either by showing (or even by stipulating) matters irrelevant thereto. The point is that the attempt there was not to foreclose facts, but to foreclose a *legal conclusion.*

In this case all the facts *in the record* dictated the legal conclusion drawn by the Court of Appeals which respondents do not challenge and have no standing to challenge — that *on this record* Texas law cannot rule this case. Parties may stipulate the factual basis upon which the case shall be "*solely*" determined — as these parties did — and such a stipulation does bind the Court to enter no legal conclusions which the stipulated factual basis does not support.

This obvious and well-settled distinction, *viz.*, that parties may not bind the Court to conclusions of law by calling them "facts" in a stipulation — but that when they stipulate the factual basis of determination the

*Court is* bound thereby — is spelled out in *Burstein* v. *U. S.*, 232 F. 2d 19 (CA 8, 1956) — a case cited in the Petition at Page 6, on which respondents have no comment. The Court of Appeals for the Eighth Circuit made the distinction mentioned; and held, in accordance with all authority in Federal Courts that we have found or that has been cited:

> "Valid stipulations are controlling and conclusive, *and courts are bound to enforce such stipulations.*" (*Ibid.*, 22) [3]

It is significant that respondents have no comment whatever on this case, cited at pages 6 and 12 of the Petition.

Similarly, respondents isolate a few sentences from a *Texas* case (*McClure* v. *Heirs of Sheek*, 4 S.W. 552 (1887)) which say that a stipulation is not to be enforced like a contract "under all circumstances," but may be set aside by the Court "when their enforcement *would result in serious injury* to one of the parties **and** *the other would not be prejudiced by its being set aside.*" (Response, p. 8) Of course this supports our position, as shown also by the other Texas cases cited in the Petition at page 12. The use to which respondents then put the quotation they isolate is, however, revealing. They go on to say (Response, p. 8) that Petitioner would not be prejudiced by setting aside the stipulation because, they say, it has "admitted" that it was doing business in Texas and that Petitioner's evidence will not have deteriorated because "the public records of Texas are and will

[3] "[W]e deem the stipulation before us to be a stipulation of facts and not the stipulation of a legal conclusion to be drawn from the facts." **Ibid, 24.** The case further develops this plain distinction.

be just as 'fresh and available' as they were ten years ago." Such talk is nonsense. The Court of Appeals has held that there is no basis for a finding that Petitioner was doing business in Texas at the time this policy attached; and certainly Petitioner had not admitted it. Neither would Petitioner's evidence on that point—or its evidence to show that this was a foul loss—consist of public records.

Respondents seek to camouflage their failure at two trials to present any evidence whatever that could bring this case within reach of Texas law by asserting that Petitioner has not produced an arsonist. The *non-sequitur* is evident. The respondents, who well knew what the real fact was as to arson, were sufficiently concerned as to what evidence Petitioner could produce at the second trial to forego production of evidence necessary to bring the case under Texas law, if that would keep out the fruits of Petitioner's investigation. Respondents preferred the desperate alternative of sending the District Judge after the second trial a copy of a purported authority to do business in Texas in the hope of inducing the District Court to commit the error of concluding the question of actually *doing business* in Texas by "judicial notice,"—rather than face Petitioner's evidence as it was at that time. Their own act, at that time—in contrast to their present professions of confidence as to the *present* unavailability of an arsonist—tells its own story. As the Court of Appeals for the Eighth Circuit observed: "Stipulations are frequently the result of compromise." (*Burstein* v. *U. S.*, 232 F. 2d 19, 22 (CA 8, 1956)

Neither in the District Court, nor in the Court of Appeals, did respondents show or even claim any injustice

to themselves as a result of enforcing the stipulation, or absence of prejudice to Petitioner from setting the stipulation aside. And neither court was in possession of the facts on which to make such determinations. The District Court (not the Court of Appeals—and certainly not this Court) was the place to have attacked the stipulation. This, the respondents — with full knowledge of all relevant facts and considerations—chose not to do.

The attempt of respondents to shrug off two of the three cases (from the Second and Ninth Circuits) cited at page 6 of the Petition and their total failure even to comment on the *Burstein* case, *supra,* cited at the same page, demonstrates their inability to find any answer to the single and far-reaching issue presented by the Petition, or to the plain fact that the present decision is in conflict with decisions in other courts of appeal.

The court below having squarely held that petitioner was entitled to judgment on the stipulated record perpetrated an obvious injustice when it deprived petitioner of the benefits of respondents' deliberate stipulation. Respondents sought and secured that stipulation to obtain advantages to themselves in view of their knowledge of the then-existing situation in order to escape the impact of petitioner's proof as it existed at that time. Now in view of their knowledge of the evidentiary situation as it has become after the lapse of years, respondents are cheerfully willing to accept the unasked and unexpected favor of relief from their stipulation—contrary to the law as declared by the courts, including three other Federal Courts of Appeal.

There can be only one view that conflict between Federal Courts of Appeal as to what the law is raises an intolerable uncertainty.. That uncertainty here goes to a proposition vital to the daily administration of "equal justice under law." Will a Federal Court of Appeals which cannot possibly know the considerations that underlay its making, strike down *sua sponte* the deliberate, valid and unchallenged stipulation of the parties as to the factual basis upon which solely the case shall be tried?

Respectfully submitted,

EDWARD B. HAYES
JOE A. KEITH
*Attorneys for Petitioner*